

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**BETTY C. VANN**

Claimant

VS.

**WINFIELD STATE HOSPITAL**

Respondent

AND

**STATE SELF-INSURANCE FUND**

Insurance Carrier

Docket No. **189,857**

**ORDER**

Respondent appealed Administrative Law Judge Jon L. Frobish's Award dated November 6, 2000. The Board heard oral argument on April 13, 2001.

**APPEARANCES**

Claimant appeared by her attorney, Robert R. Lee. Respondent and insurance carrier appeared by their attorney, Jeffery R. Brewer.

**RECORD & STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. The Award does not list the deposition of C. William Alexander, Ph.D., dated June 28, 2000, as part of the record. However, the findings in the Award contain reference to that deposition testimony. At oral argument to the Board, the parties agreed that the deposition was evidentiary and part of the record for consideration in this case.

**ISSUE**

This is a review and modification proceeding wherein the Administrative Law Judge determined that the claimant's disability had increased from a prior agreed award of a 60 percent work disability to a permanent total disability. The respondent requested review

of the issue of the nature and extent of the claimant's disability. Respondent contends that the claimant is still capable of engaging in substantial gainful employment and has not met her burden of proof to establish that she is permanently totally disabled.

Conversely, the claimant contends she has met her burden of proof to establish that she is permanently totally disabled and the Administrative Law Judge's award should be affirmed.

### **FINDINGS OF FACT**

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

The claimant was injured on December 2, 1993, when a severely retarded patient the claimant was diapering rolled back pinning the claimant's arms underneath the patient. The claimant noted a cracking noise in her neck and the onset of severe neck pain which radiated into her left shoulder and arm.

Following a course of conservative treatment, Dr. Stein performed a C5-6 anterior discectomy and decompression with an anterior body fusion on May 18, 1994. The claimant continued to have pain and on August 22, 1994, Dr. Stein noted that a follow-up cervical x-ray failed to reveal a specific bone graft fusion. However, Dr. Stein concluded that there was no movement of the cervical spine at the fused level and released the claimant on January 13, 1995. After the claimant was released from treatment with Dr. Stein, her treatment consisted of intermittent visits to her primary care physician, Dr. Kaul.

On July 5, 1995, the parties entered into a Joint Award which determined the claimant was physically unable to return to work with the respondent. The permanent partial disability award was based upon a 60 percent task loss and a 60 percent wage loss which resulted in a 60 percent work disability.

The claimant filed an application for review and modification of the Joint Award and alleged that her condition had worsened to such a degree that she is now permanently and totally disabled.

The claimant testified that she is no longer able to drive her own vehicle because the mobility of her neck has decreased. The claimant can no longer completely care for herself. Her grandson who lives with her is responsible for grocery shopping, laundry, dishwashing and providing her with transportation. The claimant is currently on social security and KPERS disability.

The claimant testified that she has continuous pain in her neck and shoulders and is taking medication for her pain and depression. The medication the claimant is taking includes Zoloft to relax, Soma, a muscle relaxant, Darvocet for her pain and Librium for her depression. As a result of the constant pain, the claimant does not feel she is able to perform any type of gainful employment.

Dr. Kaul testified that his treatment of the claimant primarily consisted of medication for her pain and depression. He testified that her pain has increased over the years and that she does not have much movement of her neck. The doctor opined that as a result of her work-related injury to her neck and shoulder the claimant is unable to engage in any type of gainful employment.

The claimant was evaluated on respondent's behalf by Dr. Mills on August 17, 2000. Dr. Mills diagnosed the claimant with chronic pain syndrome status post cervical radiculopathy with surgical discopathy and fusion. He further opined that as a result of her work-related injury the claimant had a 15 percent permanent partial functional impairment. Dr. Mills opined that he would release the claimant to work per the restrictions contained in a functional capacity evaluation that was performed December 5, 1994. That report noted that claimant was functioning at a sedentary physical demand level of exerting up to 10 pounds of force occasionally and/or negligible amount of force frequently. Lastly, Dr. Mills' report noted that claimant's testing provided results that were consistent with depression.

Dr. Mills repeatedly emphasized that his opinion did not factor in the mental and behavioral disorder because that was outside his area of expertise. When questioned whether he felt the claimant was employable, the doctor again stated that he did not know whether the claimant was employable from a mental and behavioral disorder standpoint. He further noted that the claimant does have some substantial restrictions. He concluded that from a musculoskeletal standpoint sedentary work would be within her limitations and he would not hire her for more than those restrictions outlined in the functional capacity evaluation.

Dr. Alexander, a clinical psychologist, evaluated the claimant on March 30, 2000. As a result of his examination the doctor made the following diagnoses: (1) Pain disorder associated with psychological factors and a general medical condition. The doctor defined this condition as a chronic pain condition where there is a medical injury in which psychological factors have evolved as a major component to perpetuating the chronic pain. (2) Generalized anxiety disorder which he defined as anxiety, nervousness, difficulty concentrating and indecisiveness which is pervasive through the person's day. (3) Depressive disorder not otherwise specified which he defined as general depression, symptoms of sadness, tearfulness, pessimism about the future and loss of energy. (4) Personality disorder not otherwise specified which was defined as behavioral and cognitive features that tend to be maladaptive and affects relationships and work behavior. (5) Post surgical spinal injury which was defined as a medical, non-mental health issue. (6) Psychosocial stressors which he defined as childhood abuse, health problems in the

family, limited social support, unable to work and discord with medical provider. (7) Axis V, current GAF 50 which he defined as adaptive functioning, reflecting that in general the claimant is having quite a few difficulties coping and adjusting in her life and is limited in most areas of her functioning.

Dr. Alexander opined that as a result of her work-related injury she has a 50 percent impairment of function based upon the *AMA Guides*, Fourth Edition. When queried about the effect that claimant's mental condition has on her ability to work or become employed, the doctor responded that the claimant was mentally very unlikely to be able to return to gainful employment regardless of her physical stature. The doctor further noted that the claimant's depression and anxiety and her view of what she could accomplish had been damaged to the point where it would be very unlikely for her to be able to return to work.

### **CONCLUSIONS OF LAW**

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>1</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>2</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.<sup>3</sup>

K.S.A. 44-510c(a)(2) (Furse 1993) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total

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<sup>1</sup>K.S.A. 44-501(a) (Furse 1993).

<sup>2</sup>K.S.A. 44-508(g) (Furse 1993).

<sup>3</sup>*Tovar v. IBP, Inc.*, 15 Kan. App.2d 782, 817 P.2d 212 (1991).

disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2) (Furse 1993), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.<sup>4</sup>

In *Wardlow v. ANR Freight Systems, Inc.*, 19 Kan. App.2d 110, 113 (1993), the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

In this instance, the claimant has been diagnosed by Dr. Kaul as being in significant constant pain and unable to engage in active substantial gainful employment. Dr. Alexander concluded that the claimant's mental condition, as a result of her work-related injury, rendered her unable to return to gainful employment irrespective of her physical stature. Uncontradicted medical testimony unless shown to be improbable, unreasonable or untrustworthy, may not be disregarded.<sup>5</sup>

The claimant's worsened condition is directly traceable to her work-related injury. Her mental and physical limitations lead the Board to the conclusion that she is essentially and realistically unemployable and thus incapable of substantial and gainful employment. It is the Board's determination that the claimant has met her burden of proof to establish that she is permanently and totally disabled.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that Administrative Law Judge Jon L. Frobish's award dated November 6, 2000, is affirmed.

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<sup>4</sup>*Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

<sup>5</sup>*Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

pc: Robert R. Lee, Claimant's Attorney, Wichita, Kansas  
Jeffery R. Brewer, Respondent's Attorney, Wichita, Kansas  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director